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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-592

LOUIS GUIDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1973. A petition for rehearing was denied on September 4, 1973. The petition for a writ of certiorari was filed on October 3, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's conviction.

2. Whether there was sufficient proof of constructive possession of heroin by petitioner, and whether the court's instruction relating to knowledge of illegal importation was proper.

3. Whether the government complied with the requirements of the Jencks Act.

4. Whether the court's instruction relating to requests to see the trial transcript was proper.

5. Whether the court properly denied petitioner's motion for a new trial based on newly discovered evidence.

6. Whether petitioner was deprived of meaningful appellate review.

STATEMENT

A twelve-count indictment (R. Doc. 2) returned in the United States District Court for the Northern District of Illinois charged petitioner and co-defendants Franklin ("Frank") Carioscia, Michael Carioscia, and Rudolph Piemonte with having conspired to sell and having knowingly sold, not in pursuance of a written order form, heroin imported contrary to law, in violation of 21 U.S.C. (1964 ed.) 174 and 26 U.S.C. (1964 ed.) 4705(a). Petitioner was tried by a jury, convicted on the five counts in which he was charged, and sentenced to concurrent terms of twenty years' imprisonment. The court of appeals affirmed (Pet. App. A).[1]

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[1] Prior to petitioner's trial, Frank and Michael Carioscia pleaded guilty and were sentenced to ten years' imprisonment. Piemonte, who was a fugitive at the time of petitioner's trial, was subsequently apprehended and acquitted at a bench trial upon the stipulated evidence from petitioner's trial.

The facts are set forth in the opinion below (Pet. App. A 1-7). Briefly, Dave Harris, a government informer, purchased heroin from the Carioscia brothers on five occasions: August 19, 1970 (App. 5-6; Tr. 17-19, 22-25),[2] September 2, 1970 (App. 7; Tr. 29-32), October 14, 1970 (App. 7-8; Tr. 50-56), December 4, 1970 (App. 8; Tr. 60-62) and January 20, 1971 (App. 9-11; Tr. 65-82). Petitioner was charged with conspiracy (Count 1) and participation in the heroin transactions of October 14, 1970 (Counts 6 and 7) and January 20, 1971 (Counts 10 and 11).

On January 19, 1971, Harris asked Michael Carioscia if he (Michael) was getting the heroin and cocaine "from the same people as before." Michael replied that "he was getting the heroin [from the same source] but he had a different source for the cocaine" (App. 9-10; Tr. 70-72, 243; V Tr. 80).[3] The following night (January 20th), pursuant to instructions from Michael Carioscia, Harris picked up Frank Carioscia and exchanged $32,000 in cash for 39 ounces of heroin. While being watched by BNDD agents, Frank got out of the car and, carrying the $32,000 in a white shopping bag with the letters "CPS" printed on its sides, walked to and entered petitioner's residence three blocks away (App. 11, 28, 31; Tr. 80, 160, 249-251, 358; V Tr. 97-98, 100-101, 103). Ten minutes later he left petitioner's residence, no longer carrying the bag (V Tr. 101). He went immediately to a nearby tavern, where he met petitioner (App.

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[2] "App." refers to petitioner's appendix on appeal, a copy of which we are lodging with the Clerk of this Court. "Tr." refers to the trial transcript.

[3] "V Tr." refers to volume V of the transcript, the only volume not paginated consecutively.

32, 35; Tr. 335). Petitioner handed Frank a large roll of bills and asked "how did it go?", to which Frank replied "Okay" (App. 36, 39; Tr. 702-704; V Tr. 191-194). After petitioner bought a round of drinks, Frank drove him home (App. 36, 39; Tr. 260, 705; V Tr. 195).

The events surrounding the October 14th heroin transation, for which petitioner was also charged and convicted, culminated in Frank Carioscia's delivery to Harris of a brown paper bag containing eight ounces of heroin. The earlier series of meetings that day between petitioner and his co-defendants are detailed in the opinion below (Pet. App. A 5-7). We note that on the afternoon of October 14th, shortly after Harris told Frank Carioscia he wanted to buy heroin that evening, Frank met petitioner at petitioner's restaurant; he was there again at 8:30 p.m., immediately after Harris told him the exact amount of heroin he needed; and he left from there at 9:30 p.m. to deliver the heroin to Harris (App. 8, 20, 25; Tr. 47-50, 148, 208, 400; V. Tr. 21, 70-77).

ARGUMENT

1. The evidence was sufficient to support petitioner's conviction on the conspiracy count and all four substantive counts.

a. The evidence overwhelmingly established that the Carioscia brothers were engaged in a narcotics conspiracy as early as August 19, 1970, when the first sale was made to Harris. From the large quantities of heroin involved in all of the sales, from references made to other parties involved ("his people", Tr. 12; their "source", Tr. 66, 70, 72), and from subsequent events on October 14 and January 19 and 20 in which petitioner was a participant, the jury had ample evi-

dence from which to infer that petitioner was a knowing member of the conspiracy.

As to the January 20th transaction, Michael Carioscia met with petitioner immediately after Harris ordered a large quantity of heroin from Michael on January 19th (App. 14, 27, 31, 37-38; V Tr. 80, 136). On the night of January 20th, Frank Carioscia took the shopping bag with the $32,000 received for the heroin to petitioner's residence; then Frank proceeded to a tavern where he met petitioner, received from petitioner a large roll of bills, and replied "Okay" to petitioner's query, "how did it go?".

The evidence of petitioner's participation in the January transaction also corroborates the evidence of his participation in the October 14th transaction, because Michael Carioscia told Harris in January that he was getting the heroin from the same source as before. From the strong evidence that Guido was the source of the January heroin, considering Michael's statement and the fact that on October 14 Frank Carioscia met petitioner at petitioner's restaurant before delivering the heroin, there was ample evidence for the jury to conclude that petitioner was also the source of the October heroin.

In summary, the evidence was such that petitioner's guilt was not, as he contends, predicated on "mere association", "suspicious circumstances", or "speculation", and petitioner's reliance on cases involving such insufficient proof is misplaced.

b. Petitioner complains that the court erred in admitting evidence with respect to narcotics transactions involving the Carioscia brothers which occurred earlier than October 14, 1970 (Pet. 24-26). The trial

court, concluding that evidence of narcotics transactions prior to October 14, although indicative of an existing conspiracy, was too speculative relative to petitioner's participation in the conspiracy (Tr. 994), instructed the jury as follows (Tr. 1103):

> Offenses committed by persons other than Louis Guido when he was not a member of a conspiracy may be considered by you only for the purpose of determining whether an unlawful conspiracy existed which Louis Guido may later have joined. You are instructed that Louis Guido was not a member of any conspiracy before October 14, 1970, and you must determine from the evidence and instructions in this case whether he participated in any unlawful conspiracy as charged in the indictment on or after that date.

This was a proper instruction. The evidence of the earlier narcotics transactions was admissible and could be considered in determining whether a conspiracy existed which petitioner joined on or after October 14, 1970. It is well settled that "the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 393.

c. Petitioner contends that co-defendant Piemonte's acquittal at a subsequent bench trial on the stipulated facts from petitioner's trial is inconsistent with a verdict of petitioner's guilt. There is, however, no inconsistency in the findings. The indictment did not allege that Piemonte was in any way involved in the January 20th heroin transaction, with respect to which

the evidence—detailed above—showed that petitioner was the source of heroin sold to Harris on that date. Moreover, even in regard to the October 14th heroin transaction, Piemonte was not acquitted "on the same facts" which led to petitioner's conviction, as petitioner contends (Pet. 32). In addition to the events occuring on October 14th, in which Guido and Piemonte jointly participated, Michael Carioscia's declaration of January 19th revealed that his source on that date was the same as the source of the heroin on October 14th.

2. Petitioner contends that there was no proof of actual or constructive possession of the heroin by him and no proof of knowledge of illegal importation. Under 21 U.S.C. (1964 ed.) 174, unexplained possession of heroin gives rise to an inference that the possessor knew that it was illegally imported.[4] *United States* v. *Davis,* 461 F. 2d 1026 (C.A. 3). "That inference is equally reasonable if the defendant himself does not have physical possession but one of his subordinates in the illegal venture does." *United States* v. *Holmes,* 452 F. 2d 249, 259 (C.A. 7). As noted above, there was ample evidence from which the jury could have inferred that petitioner was the source of the heroin involved and had power to exercise dominion and control over the drug. See *Turner* v. *United States,* 396 U.S. 398; *United States* v. *Holmes, supra,* 452 F. 2d at 258; *United States* v. *Virciglio,* 441 F. 2d 1295 (C.A. 5).

The instruction relating to the presumption arising from possession of heroin, to which petitioner objects (Pet. 38), was taken from Section 17.01-1 of the La Buy instructions (36 F.R.D. 457, 608-609) and correctly

[4] Knowledge of illegal importation is no longer an element of the offense of possession. (21 U.S.C. 841)

states the law to be applied. See *United States* v. *Slaton*, 430 F. 2d 1109 (C.A. 7), certiorari denied, 400 U.S. 997.

3. Petitioner contends that the government violated the provisions of the Jencks Act (18 U.S.C. 3500). The Jencks Act specifies that the government, after a witness has testified on direct examination, shall produce upon request any statement of the witness in the possession of the government, which relates to the subject matter of the witness' testimony. 18 U.S.C. 3500(b). Here, BNDD Agent Thompson made no written notes of his observations at Turzitti's Lounge on January 20, 1971. He reported his observations orally to his BNDD superiors, and they were incorporated, together with surveillance reports from other BNDD agents, into one written report prepared by BNDD Agent McNamara. (V. Tr. 158, 202; Tr. 709-717). This report, with Thompson's name and the names of the other BNDD agents who contributed thereto included in the report (V. Tr. 202; Tr. 685), was proffered to petitioner at trial and introduced as Defense Exhibit 4 (Tr. 684). Hence there was no possible violation of the Jencks Act.[5]

4. Following the jury instructions but prior to its deliberations, the court advised the jury that it would not be allowed to *see* a transcript of testimony, but that any other problems requiring a response from the court could be submitted in writing through the United States Marshal (Tr. 1112). Defense counsel at trial (Tr. 1113-1114) mistakenly interpreted the court's advice to

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[5] *United States* v. *Missler*, 414 F. 2d 1293 (C.A. 4), certiorari denied, 397 U.S. 913, does not suggest, as petitioner implies (Pet. 41-42), that an agent must make written notes as a prerequisite to his report, nor is there any authority for such a contention.

preclude any request by the jurors to *hear* portions of the testimony *read* to them, and moved for a mistrial (Tr. 1113-1114). At that point, the court offered to hear any suggestions for clarifying what had been what had been said by additional instructions (Tr. 1114), but defense counsel elected not to pursue the matter further.

The preferable federal procedure is to have any necessary portions of the transcript reread to jurors in open court, rather than allowing jurors to see the trial transcript in the jury room. *United States* v. *Schor,* 418 F. 2d 26, 31 (C.A. 2). Petitioner engages in considerable speculation that because of the court's instruction that the jury could not *see* the transcript, the jury *might* have had questions which they were hesitant to ask (Pet. 48). The court's offer to give a subsequent clarifying instruction, and defense counsel's failure to pursue the court's invitation, forecloses any challenge to the instruction on appeal. Fed. R. Crim. P., Rule 30; *United States* v. *Francisco,* 410 F. 2d 1283 (C.A. 8).

5. The court properly denied petitioner's motion for a new trial on the basis of newly discovered evidence which showed that co-defendant Piemonte was in Mexico on January 19 and 20, 1971, contrary to the trial testimony of two BNDD agents that he was observed in Chicago on those dates. After a hearing, the court denied the motion, incorporating its findings in an order (R. Doc. 36), including, *inter alia,* the following:

a. Agents Young and Chown were the only government witnesses who testified that they saw Piemonte in Chicago on January 19 and 20, 1971, and at most that would cast doubt only on the accuracy or veracity of

the testimony of those two agents, but would not affect the testimony of other government witnesses as to the events of those or other days.

b. Piemonte's presence in Chicago on those dates was entirely collateral to the guilt or innocence of Guido.

c. The testimony of Agents Chown and Young which did tend to incriminate Guido on January 20, 1971, was corroborated by several other government witnesses.

d. The government could prove its case against petitioner, if a new trial were granted, without calling Agents Young and Chown, and there would be no opportunity for the defendant to use the newly discovered evidence.

e. The new evidence in question at most suggested mistaken identity and would not produce a different result at a new trial.

The trial court's conclusions are amply supported by the record. Neither Young, Chown, nor any other agent mentioned Piemonte in describing the surveillance of petitioner and the Carioscias on January 20, 1971, the date on which the actual exchange of 39 ounces of heroin for $32,000 took place, the money was delivered to petitioner's residence, and petitioner gave Frank a large roll of bills in Turzitti's Lounge. Moreover, none of the overt acts listed in Count 1, or any of the allegations in Counts 2-12 (R. Doc. 2), refers to Piemonte's activities on January 19 and 20, 1971. Elements essential to procuring a new trial based on newly discovered evidence include a showing that the evidence is material to factual issues at trial, and not merely cumulative or impeaching the character or credit of witnesses, and that it is of such nature that it would probably produce a different verdict in event of retrial.

See *United States* v. *Mayersohn*, 452 F. 2d 521, 528 (C.A. 2), and cases there cited. The trial judge expressly found that the proffered new evidence met none of these tests, and that finding should not be disturbed except in the most extraordinary circumstances. See *Tomley* v. *United States*, 260 F. 2d 468 (C.A. 5); *Apel* v. *United States*, 247 F. 2d 277 (C.A. 8).

Petitioner relies mistakenly upon *Mesarosh* v. *United States*, 352 U.S. 1, in which the government had undermined the credibility of a key government witness by revealing in other proceedings that he had given extensive false testimony which was either perjurious or resulted from a psychiatric disorder. The case at bar, in contrast, involves a matter of mistaken identity of a man whose presence or absence in Chicago on January 19 and 20, 1971, is wholly immaterial to the issue of petitioner's guilt.

6. Also without merit is petitioner's final contention —that disposition of his case by the court below by way of an unpublished "order", which consists of nine printed pages discussing petitioner's claim regarding the sufficiency of the evidence, deprived him of meaningful appellate review. Petitioner has not shown how he was in any way prejudiced by the court's decision not to publish an opinion in this instance. Moreover, Rule 28 of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit, which petitioner challenges (Pet. 4, 56-58), was adopted pursuant to a resolution of the Judicial Conference of the United States. Standards set out in Rule 28 for determination whetеher an opinion will be published provide ample guidelines to insure that important matters of law are published.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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